UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JOYCE ROBINSON, Plaintiff, v. CONSOLIDATED RAIL CORPORATION (a Pennsylvania Corporation licensed to do business in New Jersey); NORFOLK SOUTHERN CORP., NORFOLK SOUTHERN RAILROAD CORP., JOHN DOES (1-10), AND ABC CORPORATION (1-10), Defendants.	Civil Action No.: 07-2687 (FSH)(PS) **Return Date: August 13, 2007** *Filed Electronically*

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS OR, ALTERNATIVELY, TO TRANSFER

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PRELIMINARY STATEMENT

Defendants Consolidated Rail Corporation ("Conrail") and Norfolk Southern Railway Company (incorrectly captioned as "Norfolk Southern Railroad Corp.") and Norfolk Southern Corp. ("Norfolk Southern" and, collectively with Conrail, "defendants") submit this memorandum of law in support of their motion to dismiss or, alternatively, to transfer the Complaint filed by plaintiff Joyce Robinson. Defendants move pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), and 12(b)(3).

All of the various eleven counts in plaintiff's Complaint arise from her employment with defendants, practically all of which occurred in Pennsylvania. Plaintiff claims she experienced a hostile work environment based on her race and gender and then was wrongfully terminated. Based on her termination and alleged conduct prior to it, she asserts common-law claims of wrongful discharge, breach of contract, and breach of the implied covenant of good faith and fair dealing, as well as statutory claims under Title VII, the Federal Employers' Liability Act, and the New Jersey Law Against Discrimination. Plaintiff's Complaint must be dismissed because all her claims fail as a matter of law and because, in any event, this Court is the improper venue for this matter. At the very least, plaintiff's Complaint should be transferred to the Middle District of Pennsylvania because that is where plaintiff was employed, where most of the events are alleged to have occurred, and where the relevant witnesses and documents are located.

Defendants move to dismiss plaintiff's claims on several different grounds. Defendants first move to dismiss the Complaint for improper venue pursuant to Fed. R. Civ. P. 12(b)(3) because venue is not proper under 28 U.S.C. 1391(b). Defendants further submit that plaintiff's claims should be dismissed on substantive grounds and, if any claims remain, those should be transferred to the Middle District of Pennsylvania, where plaintiff worked, where she resided, where the alleged incidents appear to have occurred, and where most of the witnesses and evidence are located.

Substantively, Counts Three, Four and Five should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction because the Railway Labor Act preempts claims for wrongful discharge, breach of contract, breach of the implied covenant of good faith and fair dealing. Defendants also move to dismiss certain of plaintiff's claims pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. Specifically, plaintiff's Federal Employers Liability Act claim fails because it is time-barred and because plaintiff does not allege sufficient facts to support her claim. Her Title VII claim fails because she does not allege that she received a right-to-sue letter. Her NJLAD claim fails because that statute does not apply to this dispute between out-of-state parties regarding out-of-state employment. Plaintiff's intentional and negligent infliction of emotional distress claims fail because they are time-barred and because the "negligence" claim is preempted by FELA. Finally, Conrail moves to dismiss all the claims against it on the ground that they are time-barred, as plaintiff ceased working for Conrail in 1999.

PROCEDURAL HISTORY AND ALLEGED FACTS

On April 4, 2007, plaintiff filed an eleven-count Complaint in the Superior Court of New Jersey, Law Division, Hudson County, Docket No. HUD-L-1733-07. (Notice of Removal, Docket Entry #1). Defendants removed the Complaint to this Court on June 8, 2007. (*Id.*)

In her Complaint, plaintiff avers that she resides in Harrisburg, Pennsylvania. (Complaint, Introductory Paragraph.) Defendants Norfolk Southern Corp. and Norfolk Southern Railway Co. are Virginia corporations with principal places of business in Norfolk, Virginia.

(Piserchia Decl. ¶ 3.) Plaintiff alleges that she worked for defendants from 1977 until her purportedly wrongful termination on or about July 17, 2004.[1] (Complaint, Count Three, ¶¶ 2, 3.) Plaintiff further alleges that at the time of her termination, she was employed as a locomotive train engineer operating trains in Pennsylvania, Maryland, Delaware, and New Jersey. (*Id.*, First Count, ¶ 4). Her termination allegedly resulted from an incident in Maryland which she allowed the locomotive she was driving to run through a switch. (*Id.*, Third Count, ¶ 3; Piserchia Decl. ¶ 10.)

Plaintiff further asserts that she was subjected to a hostile work environment and suffered emotional injuries by way of several events, the last of which she alleges occurred on March 19, 2004. (Complaint, First Count, ¶¶ 6-16; Count Two, ¶¶ 3-5.) To the extent that plaintiff provides details, these events are alleged to have occurred in Harrisburg, Pennsylvania (where she lived and worked). (Compl., First Count, ¶¶ 10, 13, 15; Piserchia Decl. ¶¶ 4, 10.) No events are alleged to have occurred in New Jersey.

As an engineer for defendants, plaintiff was a member of the Brotherhood of Locomotive Engineers and Trainmen, a union that is party to a collective bargaining agreement with Norfolk Southern, effective July 11, 2001. Among other things, the CBA includes a "just cause" standard that governs the discharge of subject employees. (Piserchia Decl. Ex. A.)[2] The CBA also includes a grievance and appeal procedure by which employees like plaintiff are bound to pursue their grievances. (*Id.*)

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[1] "2004" is likely a typographical error in the Complaint. Plaintiff was terminated from Norfolk Southern in July 2005, not 2004. She ceased working for Conrail in June 1999.

[2] The CBA is attached as Exhibit A to the Declaration of Philip G. Piserchia, submitted in support of the instant motion. This Court's consideration of the CBA on a motion to dismiss is proper, and does not convert it into one for summary judgment, because the CBA is indisputably authentic and is integral to, and directly referenced in, the Complaint. See Compl. Fifth Count, ¶ 7; *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997); *Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1993); *Schanzer v. Rutgers Univ.*, 934 F. Supp. 669, 671 n.1 (D.N.J. 1996).

Here, plaintiff did grieve her termination. After Plaintiff's employment was terminated, plaintiff, through her union representatives, appealed the decision through on-property appeals procedures. (Piserchia Decl. ¶ 6.) Plaintiff's appeal was ultimately denied by the highest Norfolk Southern official designated to handle such claims. Plaintiff, through her union representatives, then exercised her right to appeal Norfolk Southern's decision through arbitration, pursuant to the Railway Labor Act. (*Id.*) An arbitration panel of the Public Law Board, panel no. 6434 ("PLB No. 6434"), by decision dated June 30, 2006, denied plaintiff's claim seeking to overturn her discharge and affirmed Norfolk Southern's decision to discharge her from employment.[3] (*Id.* ¶ 7.) Plaintiff also filed a charge of discrimination relating to her termination with the Pennsylvania Human Relations Commission on November 28, 2005. (*Id.*, Ex. C.) Plaintiff's instant Complaint does not allege she obtained a right-to-sue letter.

Plaintiff asserts eleven counts against defendants: violation of the Federal Employers' Liability Act, 45 U.S.C. § 51, et seq. (First Count); hostile work environment (Count Two); wrongful discharge (Count Three); breach of contract (Count Four); breach of implied covenant of good faith and fair dealing (Count Five); intentional infliction of emotional distress (Count Six); negligent infliction of emotional distress (Count Seven); violation of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq. (Count Eight); violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)(2) (Count Nine); and joint and several liability against fictitious John Doe defendants (Count Ten) and ABC Corporation defendants (Count Eleven).

[3] Plaintiff did not and has not challenged that arbitral decision as provided by the Railway Labor Act.

ARGUMENT

I. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED OR, ALTERNATIVELY, TRANSFERRED, BECAUSE IT IS IMPROPERLY VENUED.

New Jersey is an improper venue for this dispute between a Pennsylvania resident and her Virginia-based and Virginia-incorporated employer, regarding her employment in Pennsylvania (i.e., outside New Jersey). Plaintiff's Complaint clearly should be dismissed pursuant to Fed. R. Civ. P. 12(b)(3) for improper venue. Plaintiff's Complaint is also fatally flawed on its merits, as set forth in Point II, below; to the extent the Court declines to dismiss this action or any claims, whatever remains should be transferred pursuant to Fed. R. Civ. P. 12(b)(3).

The critical issue on a Rule 12(b)(3) motion is whether venue is proper in the present court. Because defendants' removal of this matter to this Court was based on federal question jurisdiction, 28 U.S.C. § 1391(b) governs whether venue here is proper. That Section provides that (with emphasis added):

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State; (2) *a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred,* or a substantial part of property that is the subject of the action is situated; or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

The facts of this case show that venue in the District of New Jersey is improper under 28 U.S.C. Section 1391(b). This District is improper under subsection (1) because all the defendants do not reside in the same state. The Norfolk Southern defendants reside in Virginia and Conrail resides in Pennsylvania. Venue here is also improper under subsection (2) because none of the events or omissions giving rise to plaintiff's claims are alleged to have occurred in

New Jersey. Plaintiff was employed in Pennsylvania, she was terminated after an incident during a train trip from Hagerstown, Maryland to Harrisburg, Pennsylvania, and she alleges that discriminatory incidents took place in Pennsylvania. None of those alleged events took place in New Jersey. Finally, under subsection (3), regardless of whether defendants "may be found" in this District, there *is* another District in which this "action may otherwise be brought," namely, the Middle District of Pennsylvania where most, if not all, of the events or omissions giving rise to this action occurred. Venue in that court would be proper because that is where plaintiff was employed, where she resides, and where the majority of the witnesses and documents are located. (*See* Piserchia Decl. ¶¶ 4, 10.) Simply put, there is no basis for the instant claims to be venued in this Court, given that they have been brought by an out-of-state plaintiff against out-of-state defendants, arising from out-of-state actions, and that there are is another District in which this action might have been properly brought.

Because venue in this Court is not proper, 28 U.S.C. Section 1406 provides the framework for disposing of the case in this Court. *See Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 878 (3d Cir. 1995) (explaining distinctions between Section 1404 and Section 1406). Section 1406(a) provides that "[t]he district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." Under that statute, the choice of whether to dismiss or transfer is within the court's discretion. *See Gottlieb v. United States*, 2006 WL 2591069, at *2 (D.N.J. Sept. 8, 2006) (citing *Minnette v. Time Warner*, 997 F.2d 1023, 1026 (2d Cir. 1993)).

Dismissal, not transfer, is appropriate under Section 1406 in cases where, as here, the claims would still be fatally-flawed despite being venued in the transferee district. *See* Point II,, below. For example, dismissal instead of transfer is appropriate where plaintiffs lack standing to pursue their claims, *Daniel v. American Board of Emerg. Med.*, 428 F.3d. 408, 435-36 (2d Cir. 2004), or where the claims are time-barred. *Nance v. East Baton Rouge Parish Prison*, 2006 WL 1098168, at *8 (D.N.J. Mar. 31, 2006); *Rengifo-Castro v. Beeler*, 1998 WL 418044, at *5 (D.N.J. July 21, 1998). Dismissal instead of transfer is appropriate here because, as explained below, plaintiff's claims are fatally-flawed regardless of the district in which they are venued. Therefore, the Complaint should be dismissed under Rule 12(b)(3) and 28 U.S.C. § 1406.

In the alternative, should the Court decline to dismiss the Complaint in its entirety, defendants respectfully request that it be transferred to the Middle District of Pennsylvania, where most, if not all, of the events or omissions giving rise to the claims occurred, where plaintiff was employed, where she resides, and where the majority of the witnesses and documents are located.

II. THIS COURT SHOULD DISMISS THE COMPLAINT BECAUSE ALL OF THE CLAIMS LACK MERIT.

Should the Court retain the Complaint in this venue, the Complaint should nonetheless be dismissed. Defendants move for dismissal of plaintiff's Complaint on various legal grounds. While defendants argue, alternatively, for dismissal or transfer for improper venue, defendants respectfully submit that dismissing the Complaint on the clear grounds set forth below is the most appropriate course. If the Court agrees that the Complaint should be dismissed under Rules 12(b)(1) and 12(b)(6), transferring the Complaint to another court would only unnecessarily prolong this litigation and would require the parties to retain counsel in another jurisdiction, notwithstanding the fact that the case would be just as ripe for dismissal upon transfer as it is now.

A. Plaintiff's FELA Claim in Her First Count Fails to State a Claim Upon Which Relief Can Be Granted.

Plaintiff's First Count asserts a violation of the Federal Employers' Liability Act ("FELA"). The FELA claim fails for two reasons. First, the claim is time-barred because FELA requires that claims be filed within three years and the latest event alleged in support of the FELA claim occurred on March 19, 2004, more than three years before the Complaint was filed. Second, the FELA claim fails because FELA does not provide for relief where the only injuries are emotional, and plaintiff does not allege that she either suffered physical injury, or was in the zone of danger thereof. Therefore, the First Count must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

1. The FELA Claim Is Time-Barred.

Plaintiff's FELA claim must be dismissed because she filed her Complaint on April 4, 2007, which is more than three years after the last of the alleged events supporting her claim took place.

FELA has a clear statute of limitations. It provides that "[n]o action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued." 45 U.S.C. § 55. Courts routinely apply that section to dismiss untimely FELA claims. *E.g., Burke v. Gateway Clipper, Inc.*, 441 F.2d 946, 948-49 (3d Cir. 1971) (Jones Act claim governed by FELA statute of limitations); *Callahan v. CP Rail Sys.*, 2000 WL 1372878, at * 7 (M.D. Pa. Apr. 17, 2000); *Cown v. Consol. Rail Corp.*, 1999 WL 391482, at *2 (E.D. Pa. May 21,1999).

Here, plaintiff lists as support for her FELA claim an array of alleged events that began in mid-1997 and ended on March 19, 2004. (*See* Compl., First Count.) Thus, applying FELA's three-year statute of limitations, her claim must have been filed by March 19, 2007. It was not. The FELA claim must, therefore, be dismissed.

2. The FELA Claim Fails Because Plaintiff Does Not Allege Sufficient Facts to Support Such a Claim.

Even if it were not time-barred, plaintiff's FELA claim fails because she does not allege sufficient facts to support it. Plaintiff's FELA claim asserts that she suffered psychological harm as a result of alleged discriminatory acts in the workplace. Those allegations do not state a FELA claim.

FELA provides the exclusive remedy for a railroad employee injured as a result of her employer's negligence. *E.g., Wabash R.R. Co. v. Hayes*, 234 U.S. 86, 89 (1914); *Rivera v. Union Pac. R.R. Co.*, 378 F.3d 502, 506 (5th Cir. 2004); *Dewitty v. National R.R. Passenger Corp.*, 917 F.2d 566, 1990 WL 166540, at *2 (9th Cir. Nov. 1, 1990); *Waymire v. Norfolk and Western R.R. Co.*, 65 F. Supp. 2d 951, 956 (S.D. Ind. 1999), *aff'd*, 218 F.3d 773 (7th Cir. 2000). Under FELA, the Supreme Court has determined that an injured worker cannot recover for negligent infliction of emotional distress unless he or she was in the "zone of danger." *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 554 (1994). That test "limits recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." *Id.* at 547-48. Here, plaintiff does not allege that her emotional distress arose from a physical injury negligently caused by defendants, nor does she allege that defendants' negligence placed her in immediate risk of physical harm. Therefore, her claim fails as a matter of law and must be dismissed.

B. Counts Three, Four, and Five Must Be Dismissed, Pursuant to Fed. R. Civ. P. 12(b)(1), Because They Necessitate Interpretation of a Collective Bargaining Agreement and, Thus, They Are Preempted By the Railway Labor Act.

Defendants move pursuant to Fed. R. Civ. P. 12(b)(1) to dismiss Counts Three, Four, and Five for lack of subject matter jurisdiction. Because plaintiff was a railroad employee subject to a collective bargaining agreement, she was bound to arbitrate her termination grievance before the National Railroad Adjustment Board or a similar adjustment board agreed to by the parties. Plaintiff did arbitrate pursuant to the Railway Labor Act, and having done so, and having no grounds to appeal that arbitral determination (and having not even attempted to do so), she cannot now grieve her termination anew in the courts. The Railway Labor Act prohibits her from doing so.

Plaintiff was a railroad employee whose employment was subject to the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 et seq. Section 3 of the RLA provides that disputes between an employee and a railroad "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions. . . shall be handled [internally by the carrier]; but, failing to reach an adjustment in this manner, the disputes may be referred . . . by either party to the . . . Adjustment Board . . . ." 45 U.S.C. § 153, First (i). That Section subjects a certain class of disputes -- those concerning the interpretation or application of collective bargaining agreements -- to mandatory arbitration before the National Railroad Adjustment Board ("NRAB") or an arbitration panel of coordinate jurisdiction established by the parties. 45 U.S.C. § 153; *Consol. Rail Corp. v. Railway Labor Executives Ass'n.*, 491 U.S. 299, 307-308 (1989) ("*Conrail v. RLEA*"). Arbitration panels established by the parties are referred to as either a "Special Board of Adjustment" ("SBA") or a "Public Law Board." District courts do not have subject matter jurisdiction over these so-called "minor" arbitrable disputes concerning the interpretation or application of RLA collective bargaining agreements. Instead, the NRAB, an SBA, or a Public Law Board has exclusive jurisdiction over them. *Conrail v. RLEA*, 491 U.S. at 303-04; *General Comm. of Adj., United Transp. Union v. CSX R.R. Corp.*, 893 F.2d 584, 592-93 (3d Cir. 1990).[4]

1. The RLA Preempts the Wrongful-Discharge Claim.

Plaintiff's common-law wrongful discharge claim in Count Three is preempted by the RLA. Numerous courts, including this one, have held that the RLA preempts state common-law claims for wrongful discharge. *Capraro v. United Parcel Service Co.*, 1992 WL 486938, at *2 (D.N.J. July 23, 1992), *aff'd*, 993 F.2d 328 (3d Cir. 1993); *Segnit v. Nat'l R.R. Passenger Corp.*, 1984 WL 2855, at *2 (D.N.J. Jan. 27, 1984); *Hoirup v. Alaska Airlines, Inc.*, 77 Fed Appx. 408, 2003 WL 22290314, at *1 (9th Cir. Oct. 1, 2003); *Monroe v. Mo. Pac. R.R. Co.*, 115 F.3d 514, 518-19 (7th Cir. 1997); *Weathersby v. Union Pac. R.R. Co.*, 2003 WL 22038584, at *4 (N.D. Ill. Aug. 28, 2003); *McCuin v. Burlington N. & Santa Fe Railway Co.*, 2002 WL 31802845, at *4 (N.D. Tex. Dec. 11, 2002); *Nuzzo v. Northwest Airlines*, 887 F. Supp. 28, 32 (D. Mass. 1995).

Preemption of a wrongful discharge claim is particularly appropriate where, as here, litigating that claim would require interpretation of a collective bargaining agreement. The decisions in *Monroe* and *McCuin* are particularly illustrative. In *Monroe*, the plaintiff was discharged by the defendant railroad after the railroad's investigators discovered plaintiff was not incapacitated and unable to work, as he claimed, but was working for a family business on the side. 115 F.3d at 515. After the plaintiff was terminated, he grieved the termination and was afforded a hearing under the CBA. He also sued in the district court, asserting, among other things, a claim for wrongful discharge. *Id.*

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[4] Arbitral decisions under the RLA may be appealed to the District Court, but the scope of review is limited to three extremely narrcw bases: that the Board did not follow its own procedures, that the Board's order exceeded the Board's jurisdiction, or that a Board member was tainted by fraud or corruption. *See* 45 U.S.C. § 153 First (q); *Union Pacific R.R. Co. v. Sheehan*, 439 U.S. 89 (1978). Plaintiff does not invoke any of those bases here and would have no evidence to support them even if she did.

Plaintiff's wrongful discharge claim was held preempted because it required a determination of the propriety of the discharge, an issue that would have required the court to interpret the CBA and, hence, would have violated the exclusive jurisdiction of the arbitration forums under the RLA. *Id.* at 518-19. The court distinguished a wrongful discharge claim that only involves a question as to whether the employee was, in fact, discharged from one, like Monroe's, that involves a question of the propriety of the discharge. The former may proceed in court; the latter is preempted by the RLA. *Id.* at 519.

The decision in *McCuin* is equally applicable here. In that case, an employee who fainted at work and was thereafter prohibited from returning sued his railroad employer for, among other things, wrongful termination. 2002 WL 31802845, at *1. The court recognized that because the terms and conditions of plaintiff's employment were subject to a CBA, and because the CBA was the only possible contract between the parties that could modify what would otherwise be an at-will relationship, the claim for wrongful discharge would require interpretation of the CBA. *See id.* at *4. Hence, it was preempted. *Id.*

Like the wrongful discharge claims in *Monroe* and *McCuin*, this Court's adjudication of the wrongful discharge claim in this case would require interpretation of the parties' CBA. Plaintiff was subject to a CBA effective July 11, 2001, between the Brotherhood of Locomotive Engineers and Trainmen and Norfolk Southern. Article 31(A)(1) of the CBA provides that an employee "shall not be discharged, suspended or otherwise disciplined without just cause and without a fair and impartial hearing…." (Piserchia Decl. Ex. A.) Defendants maintain that plaintiff was terminated for cause after the locomotive she was operating ran through a switch.

Plaintiff challenges that determination and claims that the switch "was not operative at the time of the incident." (Compl., Count Three, ¶ 3.) Her Complaint explicitly recognizes that whether her discharge is wrongful is inextricably linked to whether it was "without cause." (Compl., Count Four, ¶ 3.) The one, and only, authority against which these disputes can be measured is the CBA's discharge provision and arbitration procedures. Therefore, plaintiff's wrongful discharge claim in Count Three is preempted by the RLA.[5]

2. The RLA Preempts the Breach of Contract Claim.

Plaintiff's breach of contract claim in Count Four, which merely re-hashes the facts on which her wrongful discharge claim is based, is also preempted by the RLA because the only contract at play was the parties' collective bargaining agreement.

Numerous courts have held that claims of breach of [employment] contract are preempted by the RLA because -- not surprisingly -- they necessitate interpretation of a contract, *i.e.*, the collective bargaining agreement. *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 324 (1972) ("The fact that petitioner characterizes his claim as one for 'wrongful discharge' does not save it from the [RLA's] mandatory provisions for the processing of grievances..."; such claims are preempted by RLA); *Capraro v. United Parcel Serv. Co.*, 993 F.2d 328, 332-33 (3d Cir. 1993); *Hall v. Continental Airlines, Inc.*, 127 F. Supp. 2d 811, 812-13 (S.D. Tex. 2001); *Edwards v. United Parcel Serv., Inc.*, 974 F. Supp. 1043, 1046-47 (W.D. Ky. 1997); *Sirois v. Bus. Express, Inc.*, 906 F. Supp. 722, 729 (D.N.H. 1995). In *Capraro*, for example, the Third Circuit held an employee's state common-law claims, including breach of contract and wrongful

[5] The wrongful discharge claim must also be dismissed because, to the extent it is based on defendants' alleged acts of discrimination, the discrimination statutes of Pennsylvania and New Jersey preempt it. *See, e.g., Rush v. Scott Specialty Gases, Inc.*, 914 F. Supp. 104, 109 (E.D. Pa. 1996), *rev'd in part on other grounds*, 113 F.3d 476 (3d Cir. 1997); *Brennan v. Nat'l Tel. Directory Corp.*, 850 F. Supp. 331, 334 (E.D. Pa. 1994); *Santiago v. City of Vineland*, 107 F. Supp. 2d 512, 567 (D.N.J. 2000).

discharge, were preempted by the RLA where those claims all revolved around "the termination of an employment relationship regulated by the collective bargaining agreement and the RLA." 993 F.2d at 333. Similarly, the court in *Sirois* dismissed a breach of contract claim arising from a termination where the plaintiff referred to the CBA in her claims and where interpretation of the CBA was necessary to determine plaintiff's right to continued employment. *See* 906 F. Supp. at 728-29. Simply put, because the RLA preempts claims that require interpretation of the parties' contract, i.e., their CBA, breach of contract claims are preempted. *See Edwards*, 974 F. Supp. at 1047 (observing that "we do not see how [the employee] could expect us not to interpret the [CBA] were we to rule that [his employer] did or did not breach its provisions" (emphasis in original)).

Likewise, here, it is difficult to see how plaintiff could expect this Court not to interpret the CBA, where the CBA contains a "without just cause" discharge provision, which plaintiff explicitly invokes in her breach of contract claim. (*See* Compl., Count Four, ¶ 3.) Not only does plaintiff explicitly invoke the CBA, but the basis for her breach of contract claim is that "there was never any evidence of wrongdoing" on her part. (Compl., Count Four, ¶ 4.) That is a contention that will necessarily involve an inquiry into the CBA's arbitration process as invoked here, and is an inquiry into whether the evidence presented at the arbitral hearing constituted "cause" to terminate her. Because plaintiff's breach of contract claim is essentially a claim for breach of the parties' CBA, the claim is preempted by the RLA and must be dismissed.

3. The RLA Preempts the Breach of the Implied Covenant of Good Faith and Fair Dealing Claim.

Because the breach of contract claim is preempted, the breach of the implied covenant of good faith and fair dealing ("GFFD") claim, which is nothing more than an appendage of the breach of contract claim, is also preempted.

In New Jersey, a GFFD claim depends on the duties arising from an underlying contract. *See, e.g., Noye v. Hoffman-La Roche Inc.* 570 A.2d 12, 14 (N.J. Super. App. Div. 1990) ("In the absence of a contract, there can be no breach of an implied covenant of good faith and fair dealing.").[6] As explained in the immediately preceding point, the only contract in play in this case is the parties' CBA. If the breach of contract claim is preempted by the RLA, and the GFFD claim is attendant to the breach of contract claim, it naturally follows that the GFFD claim is preempted. Several courts have so held. *E.g., Espinal v. Northwest Airlines*, 90 F.3d 1452, 1458-59 (9th Cir. 1996); *Meaux v. Northwest Airlines, Inc.*, 2006 WL 1867748, at *4 (N.D. Cal. July 6, 2006); *see also, Belzer v. Am. Airlines*, 2007 WL 685865, at *3 (E.D. Cal. Mar. 5, 2007) (noting same in context of motion for preliminary injunction to reinstate employee).

For the reasons just described, defendants ask that the Court dismiss Counts Three, Four, and Five of the Complaint because they are preempted by the Railway Labor Act and, hence, this Court lacks jurisdiction to hear them.

C. The Intentional Infliction of Emotional Distress Claim Is Time-Barred.

Count Six of plaintiff's Complaint asserts a claim of intentional infliction of emotional distress ("IIED"). The IIED claim must be dismissed because it is time-barred.

The Complaint does not indicate whether plaintiff intends to pursue her IIED claim under New Jersey or Pennsylvania law. As a Pennsylvania resident employed out of a Pennsylvania worksite, who makes no claim relating to any wrongful conduct in New Jersey, Pennsylvania law would appear to apply. However, the choice-of-law issue is irrelevant because the claim is time-barred, regardless of whether New Jersey or Pennsylvania law applies: The statute of limitations for IIED in both New Jersey and Pennsylvania is two years from the date of the last conduct. 42 Pa. Cons. Stat. Ann. § 5524; *Garvin v. City of Philadelphia*, 354 F.3d 215, 219 (3d Cir. 2003); *Ormsby v. Luzerne County Dept. of Public Welfare*, 149 Fed. Appx. 60, 62, 2005 WL 2184759. at *1 (3d Cir. 2005); N.J.S.A. 2A:14-2; *Carino v. O'Malley*, 2007 WL 951953, at *9 (D.N.J. Mar. 28, 2007); *Fraser v. Bovino*, 721 A.2d 20, 25 (N.J. Super. App. Div. 1998). The alleged events that form the basis of plaintiff's FELA emotional injuries claim and her common law emotional distress claim span the period 1997 through March 19, 2004. Thus, March 19, 2006 was the last day on which she could have filed her IIED claim. Since she filed her Complaint in this action on April 4, 2007, her IIED claim was more than a year too late. Plaintiff's IIED claim must, therefore, be dismissed.[7]

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[6] As discussed throughout, whether this Pennsylvania plaintiff is entitled to invoke New Jersey law pertaining to her Pennsylvania-based employment is doubtful. But, in any event, even if Pennsylvania recognized a claim for breach of the implied covenant of good faith and fair dealing, it would nonetheless still be preempted under the RLA, as it is an appendage of the breach-of-contract claim.

D. The Negligent Infliction of Emotional Distress Claim is Time-Barred and is Precluded By FELA.

1. FELA Provides the Exclusive Remedy for the Injuries that Form the Basis of Plaintiff's Negligent Infliction of Emotional Distress Claim.

Plaintiff's common-law negligent infliction of emotional distress claim, which she asserts in Count Seven, is preempted by FELA. It is well-established that FELA provides the exclusive remedy for a railroad employee injured as a result of her employer's negligence. *E.g., Wabash R.R. Co. v. Hayes*, 234 U.S. 86, 89 (1914); *Rivera v. Union Pac. R.R. Co.*, 378 F.3d 502, 506

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[7] Even if it were not time-barred, the intentional infliction of emotional distress claim would also fail because, by its implication of defendants' conduct in connection with the terms and conditions of plaintiff's employment, it would require interpretation of the CBA and would be preempted by the RLA. *Fell v. Continental Airlines, Inc.*, 990 F. Supp. 1265, 1268 (D. Colo. 1998) ("only by comparing the [procedures in the CBA] promised by [the employer] with its behavior, could a fact finder determine whether … [the employer's] behavior was outrageous or willful and wanton"); *see also Nelson v. Soo Line R.R. Co.*, 58 F. Supp. 2d 1023, 1025 (D. Minn. 1999); *Flanary v. USAir, Inc.*, 1997 WL 364090, at *5 (S.D. Cal. Mar. 27, 1997); *Capraro v. United Parcel Serv. Co.*, 993 F.2d 328, 334 n.9 (citing with approval authority outside this Circuit holding that such a claim was preempted by the RLA).

(5th Cir. 2004); *Dewitty v. National R.R. Passenger Corp.*, 917 F.2d 566, 1990 WL 166540, at *2 (9th Cir. Nov. 1, 1990); *Waymire v. Norfolk and Western R.R. Co.*, 65 F. Supp. 2d 951, 956 (S.D. Ind. 1999), *aff'd*, 218 F.3d 773 (7th Cir. 2000). Therefore, plaintiff's claim in Count Seven should be dismissed because her exclusive remedy for negligent infliction of emotional distress ("NIED") is a FELA action, which she pursues in the First Count, and which defendants address in Point I.A. above.

2. The Negligent Infliction of Emotional Distress Claim is Time-Barred.

Even if it were not preempted by FELA, plaintiff's NIED claim would fail because it is time-barred. Regardless of which state's law would apply to the claim, plaintiff's NIED claim is subject to a two-year statute of limitations in both Pennsylvania and New Jersey. 42 Pa. Cons. Stat. Ann. § 5524; *Carino v. O'Malley*, 2007 WL 951953, at *9; *Aquilino v. Philadelphia Catholic Archdiocese*, 884 A.2d 1269, 1275 (Pa. Super. 2005); *Fleming v. United Parcel Serv., Inc.*, 604 A.2d 657, 685-86 (N.J. Super. L. Div. 1992), *aff'd*, 642 A.2d 1029 (N.J. Super. App. Div. 1994). Therefore, plaintiff's NEID claim, which was filed on April 4, 2007, and more than two years after the last alleged distress-causing act in March 2004, is untimely.

E. Plaintiff's NJLAD Claim Fails Because the NJLAD Does Not Apply to Extraterritorial Actors and Actions Such as Those Here.

Count Eight asserts a claim under the New Jersey Law Against Discrimination ("NJLAD"), N.J.S.A. 10:5-1, *et seq.* Plaintiff's Count Two, which asserts a claim for "Hostile Work Environment," is subsumed within the NJLAD claim in that hostile work environment is not an independent basis for relief, but a species of discrimination. Count Eight and Count Two fail as a matter of law, inasmuch as they are NJLAD claims, because the NJLAD does not apply to these parties or the alleged conduct, which have insufficient connections to New Jersey.

The NJLAD does not apply to employment actions with little or no connections to New Jersey. *See Bucilli v. Timby, Brown & Timby*, 660 A.2d 1261, 1263-64 (N.J. Super. App. Div. 1995) (NJLAD did not apply to retaliation claim of New Jersey resident employed in Pennsylvania based upon her alleged reporting of sexual harassment that occurred in Pennsylvania); *Coraggio v. Time Inc. Magazine Co.*, 1995 WL 242047, at *3-4 (D.N.J. Apr. 26, 1995) (NJLAD does not apply where "virtually every act alleged in plaintiff's complaint occurred in New York" and employer was headquartered in New York) *disagreed with on other grounds, Gray v. Shearson Lehman Bros., Inc.*, 947 F. Supp. 132 (S.D.N.Y. 1996); *Weinberg v. Interep Corp.*, 2006 WL 1096908, at *6 (D.N.J. Apr. 26, 2006) ("New Jersey courts have consistently applied the law of the state of employment to claims of workplace discrimination, and therefore only apply the NJLAD if the claimant was employed in New Jersey."); *Satz v. Taipina*, 2003 WL 22207205, at *18 (D.N.J. Apr. 15, 2003) (holding that plaintiff could not assert NJLAD claim, where he worked exclusively in Pennsylvania and Delaware offices of defendant that also had New Jersey offices), *aff'd*, 122 Fed. Appx. 598 (3d Cir. 2005); *see Shamley v. ITT Corp.*, 869 F.2d 167, 168-72 (2d Cir. 1989) (New Jersey common law does not apply to wrongful discharge and other tort claims of New Jersey resident who was employed in New York and whose employer was headquartered in New York);[8] *Norris v. Harte-Hanks, Inc.*, 2004 WL 2913943, at *3 (3d Cir. Dec. 17, 2004) (holding that New Jersey's whistleblower statute did not apply and observing that "it is well established in New Jersey that claims . . . relating to out-of-state employment, are governed by the law of the state in which [the employee] worked"); *Perry v. Prudential-Bache Sec., Inc.*, 738 F. Supp. 843, 854 n.6 (D.N.J. 1989) (New

[8] The Second Circuit agreed with a prior decision of the New Jersey Appellate Division, which held, in an earlier stage of the same case, that the NJLAD did not apply. *Shamley*, 869 F.2d at 168-72 (citing *Shamley v. ITT Corp.*, 1998 N.J. Super. LEXIS 530, at *3 (App. Div. 1988)).

Jersey law did not apply to wrongful discharge claim "given the New York employment issue here"), *aff'd*, 904 F.2d 696 (3d Cir. 1990).

This Court has even sanctioned a plaintiff's attorney for ignoring his adversary's request to dismiss his client's NJLAD claims under *Buccilli*, where the employment conduct occurred entirely in Pennsylvania. *Brunner v. Allied Signal, Inc.*, 198 F.R.D. 612, 614 (D.N.J. 2001) (referencing earlier unpublished decision in the matter dismissing NJLAD claims because the NJLAD did not apply to the subject conduct). In short, an employee employed in a foreign state outside New Jersey may *not* avail herself of the NJLAD's protections. *See Buccillli*, 660 A.2d at 1263; *accord Shamley*, 869 F.2d at 168-72; *Perry*, 738 F. Supp. at 854 n.6.

In this case, there are insufficient (if any) New Jersey connections to serve as the basis for plaintiff's NJLAD claim. The only connection to New Jersey stated in the Complaint is that New Jersey was one of four states through which plaintiff alleges she drove trains at some point during her employment. But the fact that plaintiff's employment sometimes took her through New Jersey does not mean that she may invoke the NJLAD's protections. Plaintiff lives in Harrisburg, Pennsylvania. Plaintiff was based out of defendants' yard located in Harrisburg, Pennsylvania. That is where she reported to work. She does not claim that any of the allegedly discriminatory incidents occurred in New Jersey. In short, the overwhelming majority of her employment did not occur in New Jersey and none of the purported discriminatory acts are alleged to have occurred in New Jersey. Moreover, plaintiff herself has acknowledged that her claims are Pennsylvania-centric: She filed her charge of discrimination with the Pennsylvania Human Rights Commission, not the New Jersey Division of Civil Rights, and made no mention of New Jersey or New Jersey law in her charge. (*See* Piserchia Decl. Ex. C.)

Because plaintiff has not alleged, nor can she allege, sufficient connections to New Jersey to support application of the NJLAD, her NJLAD claims must be dismissed.

F. Plaintiff's Title VII Claim Fails Because She Failed To Exhaust Her Administrative Remedies.

Plaintiff's Count Nine asserts a claim for violation of Title VII. Plaintiff's Count Three, which asserts a claim for "Hostile Work Environment," implicitly asserts a violation of Title VII in that hostile work environment is not an independent basis for relief, but a species of discrimination. Counts Nine and Three fail as a matter of law, inasmuch as they are Title VII claims, because plaintiff failed to exhaust her administrative remedies.

An employee intending to sue her employer under Title VII must first exhaust her administrative remedies by filing a charge with the EEOC or a complimentary state agency and receiving a right-to-sue letter from that agency. *See* 42 U.S.C. § 2000e-5(f)(1); *Ditzel v. University of Medicine & Dentistry of New Jersey*, 962 F. Supp. 595, 602 (D.N.J. 1997). That charge must be filed within 180 days of the discriminatory act, or within 300 days of the act if a state or local equal employment opportunity agency has jurisdiction over the charge. 42 U.S.C. § 2000e-5(e)(1); 29 C.F.R. §§ 1601.13, 1601.74.

An employee who fails to first file an administrative charge of discrimination and receive a right-to-sue letter has failed to exhaust her administrative remedies, and her discrimination lawsuit must be dismissed. *See, e.g., Winter v. Cycam / Medsource Techs.*, 166 Fed. Appx. 593, 595 (3d Cir. 2006); *Ditzel*, 962 F. Supp. at 602. This mandatory pre-requisite is "'established doctrine.'" *Robinson v. University of Medicine & Dentistry of New Jersey*, 2006 WL 3371748, at *1 (D.N.J. Nov. 17, 2006) (quoting *Glus v. G.C. Murphy Co.*, 562 F.2d 880, 885 (3d Cir. 1977)). It is to be strictly applied and will not "be disregarded by courts out of a vague sympathy for particular litigants." *Baldwin County Welcome Ctr. v. Brown*, 466, U.S. 147, 152 (1984) (dismissing *pro se* Title VII complaint for failing to comply with administrative filing requirements).

In this case, plaintiff has not alleged any facts to show that she exhausted her administrative remedies. She does not allege she received a right-to-sue letter. Her Title VII claim must be dismissed, accordingly.

G. Counts Ten and Eleven, Which Repeat Plaintiff's Claims Against Defendants As Against Anonymous Defendants, Fail Because Plaintiff's Other Claims Lack Merit.

Finally, Counts Ten and Eleven of plaintiff's Complaint must also be dismissed because they simply repeat, as against anonymous defendants, her other meritless counts. As paragraph 3 of Count Ten and paragraph 3 of Count Eleven make clear, these two counts are not "original" claims for relief, but are merely the substantive claims in the first nine counts re-hashed and stated against John Does and ABC Corporation. Because the first nine counts fail on their merits, as detailed above, Counts Ten and Eleven also fail and must be dismissed.

III. THE CLAIMS AGAINST CONRAIL ARE TIME-BARRED.

Plaintiff's claims against defendant Conrail fail for all of the same reasons as plaintiff's claims against Norfolk Southern. But her claims against Conrail fail for the additional reason that they are all time-barred, inasmuch as plaintiff has not been a Conrail employee for over seven years. As explained above, the statute of limitations for FELA claims is three years; the statute of limitations for intentional and negligent infliction of emotional distress is two years; and plaintiff has failed to comply with the administrative prerequisites to bringing a Title VII claim and, in any event, she did not name Conrail on her PHRC charge. (Piserchia Dec. Ex. C.) In Pennsylvania the statute of limitations for wrongful discharge is two years. *Kuhn v. Oehme Carrier Corp.*, 255 F. Supp. 2d 458, 467 (E.D. Pa. 2003). The statute of limitations for wrongful discharge in New Jersey is not settled; however, the longest possible period would be six years.

See, generally, Rosemary Alito, New Jersey Employment Law § 2-5 (2d ed. 1999 and supp.). The statute of limitations for breach of contract is six years in New Jersey and four years in Pennsylvania. N.J.S.A. 2A:14-1; *Windsor Card Shops, Inc. v. Hallmark Cards, Inc.*, 957 F. Supp. 562, 566 (D.N.J. 1997); 42 Pa. Cons. Stat. § 5525(a); *Jodek Charitable Trust, R.A. v. VerticalNet Inc.*, 412 F. Supp. 2d 469, 475 (E.D. Pa. 2006). Because the claim for breach of the implied covenant of good faith and fair dealing depends on the breach of contract claim, that claim would also, in effect, be subject to a six year statute of limitations. Finally, the statute of limitations under the NJLAD is two years. *Montells v. Haynes*, 627 A.2d 654 (N.J. 1992).

The plaintiff here has not worked for Conrail since June 1, 1999, when Norfolk Southern acquired the right to operate certain Conrail assets. (Piserchia Decl. ¶ 9.) Thus, the last time Conrail could have taken *any* action affecting her employment was more than seven years ago. Her claims against Conrail are, therefore, time-barred.[9]

CONCLUSION

For all the reasons stated above, the Complaint should be dismissed or, in the alternative, transferred to the Middle District of Pennsylvania.

Respectfully submitted,

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[9] Defendants have requested that plaintiff voluntarily dismiss her claims against Conrail. As of the filing of this motion, plaintiff has not done so.